

## STAFF REPORT for ITEM A

### **ADMINISTRATIVE CIVIL LIABILITY ORDER FOR FLORIN PERKINS LANDFILL, INC. JACKSON ROAD LANDFILL SACRAMENTO COUNTY**

#### **Introduction**

A group of family trusts, led by Nancy Cleavinger, Trustee, owns the Jackson Road Landfill. Florin Perkins Landfill, Inc. (also referred to as FPI or operator) operated the landfill until early this year. The landfill is regulated under Waste Discharge Requirements (WDRs) Order No. R5-2003-0075, which names FPI and Nancy Cleavinger, Trustee, et al. as Discharger.

In October 2004, the Regional Board adopted Cease and Desist Order (CDO) No. R5-2004-0138 for the Discharger's failure to implement landfill closure and conduct a landfill gas investigation. In March 2005, the Executive Officer issued Administrative Civil Liability (ACL) Complaint Order No. R5-2005-0506 for violations of the CDO. The ACL Complaint only names Florin Perkins, Inc. because it had exclusive control of site operations under its contract with the owner. In February 2005, the owner terminated FPI as operator and evicted it from the site for breaches of the lease agreement related to regulatory noncompliance.

The term "Discharger" used herein refers to both owner and operator as named in the facility's WDRs and CDO. FPI, as the facility operator, is identified separately in this document, as well as in the ACL Complaint and ACL Order, in regard to certain compliance issues because of its operating agreement with the owner, which states that the operator has exclusive control over site operations and is responsible for complying with all permit requirements.

#### **Site Information**

The Jackson Road Landfill is a 25-acre unclassified, unlined landfill on the Jackson Highway (across from the Florin Perkins Landfill) in the City of Sacramento. The landfill was developed in a former gravel quarry pit and accepted wastes from 1979 to 1994, including construction and demolition debris and some decomposable waste such as wood and paper. WDRs adopted after 1988 limited the discharge to specified nondecomposable inert wastes. The landfill stopped accepting wastes in 1994 but was never closed (i.e., graded for drainage and capped).

#### **Historical Overview**

The operator has a long history of WDR violations for failure to close the landfill. Prior to issuance of the current WDRs in 2003, the operator violated previous WDRs Order No. 94-261 by failing to submit a complete Final Closure Plan and failing to close the landfill by specified dates. The operator attributed its failure to comply to various delays, such as the need for replacement of transmission towers at the site and the need to negotiate drainage issues with neighboring property owners. The operator finally submitted a proposed complete Final Closure Plan (closure plan) in 2002, but remained in violation of Order No. 94-261 for failure to close the landfill. The 2003 WDRs incorporated the closure schedule as proposed by the operator in its closure plan.

## **Recent Violations**

### **Failure to Implement Landfill Closure**

The operator has violated the closure schedule contained in WDR Order No. R5-2003-0075. The WDRs required that the Discharger close the landfill by 1 November 2004 in accordance with the Discharger's closure plan. Due to the large scope of the project, the closure plan proposed closing the landfill over a two-year period, beginning in 2003. The first phase included filling and grading to establish a foundation layer for the cover. The second phase included placement and compaction of a soil cover over the landfill and construction of a large onsite detention basin to collect storm water runoff and regulate discharges to the City storm drain.

A 5 November 2003 Regional Board staff site inspection revealed that the operator had not yet begun closure construction at the site. On 10 December 2003 Regional Board staff issued an enforcement letter notifying the Discharger that the project was behind schedule, stating the delay constituted a threatened violation of the WDRs. The letter requested an updated closure plan schedule. No updated schedule was received from the operator. Subsequent inspections of the facility on 4 March 2004, 25 May 2004 and 27 September 2004 showed no evidence of closure construction. Since 1 November 2004, the operator has been in continuous violation of the WDRs for failure to close the landfill.

### **Failure to Install Gas Monitoring Wells**

The operator also violated the WDRs by failing to conduct a landfill gas (LFG) investigation which was required to evaluate whether LFG may be impacting groundwater water quality at the site. Elevated concentrations of total dissolved solids (TDS) and bicarbonate have been detected in one of two compliance wells, and may be attributable to carbon dioxide from LFG. Carbon dioxide can dissolve into groundwater and cause elevated TDS and bicarbonate concentrations. The WDRs required the Discharger to install LFG wells at the site by 1 September 2003; initiate LFG monitoring in the Third Quarter 2003; and report the LFG monitoring results semiannually, beginning with the Second Half 2003. The Second Half 2003 monitoring report submitted by the operator did not include LFG monitoring results and a 4 March 2004 site inspection by Regional Board staff revealed that no LFG monitoring wells had been installed at the site. FPI staff stated during the inspection that the wells had not been installed.

Regional Board staff subsequently issued a 15 March 2004 Notice of Violation (NOV) to the Discharger for these WDR and Monitoring and Reporting Program violations. The NOV requested a plan and schedule for returning to compliance by 2 April 2004. The operator did not submit the requested plan. Subsequent inspections of the facility on 25 May 2004 and 27 September 2004 found that no LFG monitoring wells or probes had yet been installed at the site.

In addition to the above WDR violations, the operator recently failed to submit the Second Semester 2004 groundwater monitoring report and the 2004 Annual Monitoring Summary report, both of which were required to be submitted by January 2005 under the Monitoring and Reporting Program of the WDRs.

Violation of Cease and Desist Order

Due to the continuing violations of the WDRs, on 15 October 2004 the Regional Board issued Cease and Desist Order (CDO) No. R5-2004-0138. The CDO orders the Discharger to implement landfill closure and the LFG investigation in accordance with a revised schedule. This revised schedule requires that the Discharger submit a revised closure plan, including an updated construction schedule, by 15 November 2004; initiate construction by 15 May 2005; and complete landfill cover construction by 1 November 2006. In regard to the LFG, the revised schedule requires that the Discharger install gas monitoring probes or wells by 30 November 2004; initiate gas monitoring during the Fourth Quarter 2004; and complete the investigation and submit a report by 1 November 2005. To date, the operator has failed to perform any of the scheduled tasks under the CDO and is in continuing violation of the CDO for failure to submit a revised closure plan, failure to install LFG monitoring wells or probes at the site, and failure to monitor for LFG.

**Administrative Civil Liability Complaint Order No. R5-2005-0506**

On 4 February 2005, the Executive Officer issued a \$50,000 Administrative Civil Liability (ACL) Complaint No. R5-2005-0502 to all Dischargers named under the CDO (Nancy C. Cleavinger, Trustee et al., owners, and FPI, operator) for violations of the CDO. The owner subsequently provided information that showed that the operator was, by contract, in exclusive control of site operations and was responsible for complying with all permit requirements. Therefore, on 3 March 2005, the Executive Officer withdrew the ACL Complaint and re-issued a \$50,000 ACL Complaint (No. R5-2005-0506) in the name of the operator only. The re-issued ACL complaint was for the same CDO violations as the original complaint. ACL Complaint No. R5-2005-0506 was not paid or settled.

ACL Amount

Pursuant to CWC Section 13327, in determining the amount of any civil liability, the Regional Board must take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and other matters as justice may require.

These factors were considered as follows:

Nature and Circumstances

The nature of the first violation (failure to submit a revised Final Closure Plan) is the failure to submit a technical report in violation of a CDO. The operator failed to implement closure construction in accordance with the schedule in the original closure plan and WDRs. The closure plan therefore needed to be revised. The CDO allowed the Discharger up to two additional years to complete closure. A revised closure plan was necessary to show that the operator had a current plan and schedule for returning to compliance. However, this document has not been submitted.

The nature of the second violation (failure to install gas monitoring wells) is the failure to conduct an investigation necessary to protect water quality. The WDRs and CDO required the Discharger to install gas monitoring wells to determine if LFG is impacting groundwater quality at the site and whether LFG controls are needed as a corrective action measure.

The circumstances are such that the operator did not contest the CDO and was aware of the due dates for submission of the revised closure plan and installation of the gas wells. Notwithstanding knowledge of the CDO requirements, the operator failed to complete both tasks.

#### Extent

The CDO required the Discharger to submit the revised closure plan by 15 November 2004. As of 28 April 2005, the report was a total of 164 days late. The CDO required the Discharger to install LFG monitoring wells or probes at the site by 30 November 2004. As of 28 April 2005, installation of LFG wells at the site were a total of 149 days past due.

#### Gravity

The operator failed to comply with the closure schedule under the WDRs and was two years behind schedule at the time the CDO was issued. The CDO provided the Discharger with two additional years to close the landfill. Submission of a revised closure plan was required as the first task in the CDO schedule to assess the operator's plan to meet the due dates for landfill closure construction. Failure to submit the revised closure plan could further delay landfill closure, allowing surface drainage at the site to continue to seep into landfill waste and impact groundwater.

The failure to install LFG monitoring wells at the site means that information that might otherwise have resolved whether LFG is causing the elevated TDS and bicarbonate in the groundwater is not available, delaying the implementation of corrective measures such as LFG controls and allowing continued groundwater degradation.

#### Ability to Pay/Continue in Business

With respect to the violator, it has not been demonstrated that there is an inability to pay or to continue in business. The operator was notified of the opportunity to provide such information when the ACL Complaint was issued and has not submitted any information to date.

#### Voluntary Cleanup Efforts Undertaken

Since the ACL Order is for the failure to submit a technical report and install monitoring wells, this factor is not directly relevant. The operator has not undertaken any voluntary activities at the site to close the landfill or conduct an LFG investigation.

#### Degree of Culpability

The operator was aware of the CDO requirements for submitting a revised closure plan and chose not to comply. Revising the closure plan to include an updated closure schedule should have taken minimal effort and time, given that the substantive plan had been previously approved and incorporated into the WDRs and CDO and that the CDO included due dates for completion of closure plan tasks. The operator was also aware of the CDO requirement to install LFG monitoring wells but failed to complete the work plan and install the wells.

The operating agreement between the owner and operator (April 1993 *Agreement for Operation of Landfill*) specified that the operator would, in its sole discretion and at its sole cost and expense, manage and operate the landfill without direction or control by the owners. As landfill operator, Florin Perkins Landfill, Inc. therefore had exclusive control of landfill and other site operations. The operator is, therefore, fully culpable for the violations.

#### Economic Savings

With respect to economic savings, the operator has benefited by delaying the expenditure of funds necessary to complete the required technical report (i.e. revised closure plan) and by delaying closure construction, which cannot begin until the revised closure plan is approved. Regional Board staff estimates the minimum cost of preparing the technical report to be \$2,500. Based on an interest rate of 5 percent per annum, as of 28 April 2005, the minimum savings accrued by the operator in delaying submittal of the report 164 days is estimated to be \$55. Based on the original closure plan submitted by the operator in 2003, Regional Board staff estimates the minimum cost of closing the landfill to be \$358,000, and, as of 28 April 2005, the minimum savings accrued by the operator by a 164-day delay in closing the landfill to be \$8,040. The total estimated cost saving accrued by the operator for delaying submission of the revised closure and delaying closure of the landfill is a minimum of **\$8,095**.

The operator has realized economic savings by delaying the expenditure of funds necessary to install and monitor the LFG monitoring wells and by deferring the cost of installing LFG controls, should they have been determined to be necessary. Regional Board staff estimates the minimum cost of installing the LFG wells to be \$18,000 and the minimum cost of LFG monitoring and reporting to be \$3,000 per quarter. As of 28 April 2005, staff estimates that the operator accrued a minimum cost saving of \$365 by delaying installation of the LFG wells 149 days and \$6,000 by avoiding costs of LFG monitoring and reporting for the Fourth Quarter 2004 and First Quarter 2005. The minimum savings accrued by deferring the costs of installation of LFG controls by 149 days is estimated to be \$720. The total estimated cost savings accrued by the operator for delaying the LFG investigation 149 days is a minimum of **\$7,085**.

The total estimated cost savings accrued by the operator for both violations through 28 April 2005 is estimated to be **\$15,180**. Further, the delays, in part, resulted in eviction of the operator by the owner, potentially saving the operator the entire cost of landfill closure, the LFG investigation and any necessary LFG controls.

#### Other Matters as Justice May Require

Staff expended approximately 160 hours, or \$12,800 in staff costs, in generation of the original ACL Complaint, re-issuance of the ACL Complaint, and preparation of the agenda material for the Regional Board presentation.

#### Prior History of Violations

The operator has a long history of violations for failure to implement closure at the site. Prior to violating the closure schedules in the current WDRs and CDO, the operator was in violation of the previous closure WDRs for failing to submit a Final Closure Plan and failing to implement closure at the site. Staff enforcement letters were issued for these violations in 1997, 1999, and 2000 and a Notice of Violation was issued on 19 September 2002.

### **Determination of Amount**

California Water Code (CWC) Section 13350(e)(1) authorizes Administrative Civil Liability not exceeding five thousand dollars (\$5,000) for each day of a violation of a cease and desist order. The minimum total liability that is required to be imposed under Section 13350(e)(1)(B) for cease and desist order violations is one hundred dollars (\$100) for each day of the violation.

As of 28 April 2005, the Discharger has been in violation of the CDO for 164 days for failure to submit the revised FCP. The maximum liability for this CDO violation is eight hundred and twenty thousand dollars (\$820,000). The minimum liability for this violation is sixteen thousand and four hundred dollars (\$16,400).

As of 28 April 2005, the Discharger has been in violation of the CDO for 149 days for failure to install LFG monitoring wells at the site. The maximum liability for this CDO violation is seven hundred and forty-five thousand dollars (\$745,000). The minimum liability for this violation is fourteen thousand and nine hundred dollars (\$14,900).

The maximum total liability for both CDO violations is one million, five hundred and sixty five thousand dollars (\$1,565,000). The minimum total liability for both violations is thirty-one thousand and three hundred dollars (\$31,300).

### **Response to Comments**

Three comment letters were received regarding the Jackson Road Landfill. The operator, FPLI, submitted one letter through its attorney on the current ACL Complaint which named only the operator. The owner submitted two letters in response to the first complaint which had named both the owner and the operator. One of these letters was from Nancy Cleavinger, Trustee, and the other was from the owners' attorney. These letters and an excerpt of the 1993 operating agreement are included as part of this agenda item.

In its response to the ACL Complaint, FPLI argued that the Executive Officer was mistaken in his conclusion that landfill operations were under the exclusive control FPLI, and implied that the owner should not have been removed from the Complaint. The owner addressed the issue of responsibility for landfill operations and regulatory compliance in its responses to the first ACL Complaint. The owner stated that, pursuant to the operating agreement for the Jackson Road and Florin Perkins Landfills executed by the parties in April 1993, Florin Perkins Landfill, Inc. had an exclusive right for landfill operation and was expressly required to perform all activities associated with the landfills. The agreement specified that the operator would, in its sole discretion and at its sole cost and expense, manage and operate the landfill without direction or control by the owners. The owner also explained that it had to commence formal eviction proceedings and evict the operator to gain possession and control of the site.

The Executive Officer did not amend or re-issue the current ACL Complaint based on the comments received. The issue of culpability between the owner and operator for the violations is considered above in the "Degree of Culpability" section. Consistent with the ACL Complaint, the proposed ACL Order names the operator, but not the owner.

The operator has requested a hearing on the matter but has waived the 90-day requirement for a hearing (per CWC Section 13323(b)) to allow the Executive Officer time to re-evaluate the issues. Although the operator waived its right to a hearing within 90 days, the hearing was scheduled within 90 days as proposed in the ACL Complaint.

The operator also requested that the Regional Board refer the matter to mediation (per Section 648.6, Title 23, California Code of Regulations).

The operator requested copies of all documents and correspondence relevant to the Complaint submitted by the owner and other interested parties. These documents were subsequently provided to the operator and it was informed of the Regional Board's file review procedures.

#### Summary

The operator's failure to submit a revised closure plan has serious consequences. This violation further delays construction of a landfill cover allowing surface drainage to continue to seep into landfill waste and impact groundwater. The failure to initiate an LFG investigation by installing LFG monitoring wells at the site also delays the installation of LFG controls necessary to protect groundwater. It is imperative that the operator complies with the Orders of the Board, including the WDRs and CDO.

The Executive Officer issued the Administrative Civil Liability Complaint in the amount of \$50,000, and staff recommends that the Regional Board adopt an ACL Order for this same amount.

#### Attachments:

Jeffory J. Scharff, Attorney for owners, letter to Thomas R. Pinkos, 22 February 2005

Excerpt from Agreement for Operation of Landfill, pages 1 to 7, 29 April 1993

Nancy C. Cleavinger letter to Thomas R. Pinkos, 22 February 2005

Louis A. Gonzalez, Jr., Attorney for operator, two letters to Steve Rosenbaum, 31 March 2005

JDM/: 7-April-05

28/29 April 2005 meeting of the Central Valley Regional Water Quality Control Board